

Summary of the Minnesota Wetland Conservation Act Shared (State-Local) Implementation Model

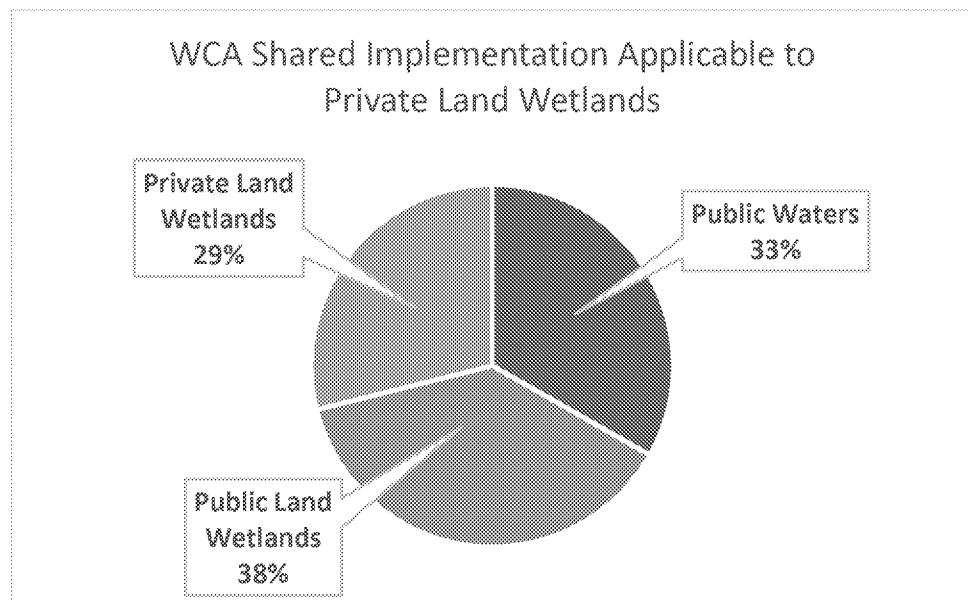
Context

Waters and wetlands in Minnesota are protected under three primary state laws:

1. The Minnesota Wetland Conservation Act (WCA), MN Rule Chapter 8420, which applies to all wetlands except for “Public Waters Wetlands.”
2. The Public Waters Permit Program (PWPP), MN Rule Chapter 6115, which regulates activities affecting lakes, rivers, streams, and certain large deeper-water wetlands classified as “Public Waters Wetlands.”
3. Minnesota water quality standards, MN Rule Chapter 7050, applicable to all waters of the state.

This document focuses solely on the WCA implementation structure, as local government involvement in program implementation is limited to WCA, with the PWPP and state water quality standards being implemented solely by state agencies. Within WCA, local government involvement is subject to further limitations, as the state is responsible for implementation on state lands, for mining projects, for activities affecting calcareous fens, and for Public Water Wetlands under the PWPP. Additionally, the state directly services applications for most transportation projects that impact wetlands, including any associated mitigation, and administers the wetland banking program. Consequently, the WCA shared implementation structure results in LGU implementation of a limited subset activities affecting only non-Public Water wetlands on private lands, and excludes calcareous fens, mining projects and most transportation projects.

The accompanying graph displays the approximate proportion of waters (lakes) regulated under the PWPP, wetlands occurring on state land, and wetlands occurring on private lands. It is a subset of the wetlands on private lands that are subject to the WCA shared-implementation model involving local governments.



Please note that the Public Waters portion, above, is based on acres of lakes/non-wetland basins and does not account for an additional 221,195 linear miles of streams for which LGUs have no

responsibilities in regulatory program implementation. These figures are based on a 2018 analysis and could be updated with more current data from the recent Minnesota NWI update if necessary.

Minnesota Wetland Conservation Act Background

WCA was passed by the state legislature and signed by Governor Carlson in 1991. The program took effect in 1992 upon promulgation of the WCA administrative rules by the State Board of Water and Soil Resources (BWSR). It is one of the most, if not the most, comprehensive stand-alone state wetland protection law in the country. WCA authority is independent of any federal law, process, or jurisdiction (e.g. 401 certification, WOTUS, etc.). It has steadily grown, evolved, and improved since its inception.

WCA operates under a “shared implementation” model, whereby both state agencies and certain local governments have roles and responsibilities in its implementation. This state-local shared implementation model was essential to gain the legislative votes necessary to pass the law in 1991, and remains a critical, well-supported part of the law to this day.

Scope of Wetland Regulatory Authority

All waters defined as wetlands by the 1987 U.S. Army Corps of Engineers Wetlands Delineation Manual, including updates and regional supplements, are jurisdictional under Minnesota law regardless of federal jurisdiction. A small percentage of large, deeper water wetlands are classified as “Public Water Wetlands” and fall under the regulatory authority of the PWPP administered by the Minnesota Department of Natural Resources (DNR). All remaining wetlands fall under the regulatory authority of WCA. While certain activities are conditionally exempt from mitigation under WCA, the two programs provide seamless regulatory authority over all wetlands in the state.

What is Meant by “Shared-Implementation?”

WCA is a state program administered by BWSR, through which certain “Local Government Units” (LGUs) issue many of the decisions **under state authority**. LGU “decisions” verify that proposed activities are consistent with the standards and requirements of WCA as established in state law. This process is similar to the USACE verifying that a project meets the requirements and conditions of a General Permit. Applications are subject to state review and comment prior to issuance of the LGU “decision,” and the state retains ultimate decision-making authority. The state DNR also plays a role both in the implementation and enforcement of WCA.

BWSR, LGUs, and the DNR (the three entities with primary responsibilities to administer, implement, and enforce WCA), are described briefly below.

Minnesota Board of Water and Soil Resources

BWSR is the state agency with administrative authority and responsibility for WCA. BWSR’s administrative responsibilities include:

- Promulgation of Minnesota Rules Chapter 8420 (the WCA rule), which contains the state standards, requirements, and procedures for WCA implementation.
- Development of all application forms, implementation procedures, policies, and guidance, including formal interpretations of statute/rule/policy/etc.
- Funding and training LGU staff.
- Administration of the state wetland bank.

- Oversight of LGU implementation activities, including the ability to appeal any local government WCA decision.
- Adjudicating appeals of LGU decisions and enforcement orders.

Within the agency, BWSR's Wetlands Section contains specialized staff dedicated to the administration and implementation of WCA and the state wetland bank. These staff include regional Wetland Specialists that conduct oversight of and provide assistance directly to the LGUs to ensure that WCA is correctly implemented.

Local Government Units

LGUs with responsibilities to implement WCA are political subdivisions of the state. They are defined in state statute and rule to include Counties, Cities, Soil and Water Conservation Districts, certain Watershed Management Organizations, or in limited circumstances, a metropolitan area township. No more than one LGU implements WCA on any given area, but all areas of the state are covered by WCA LGUs (or the state in the case of state land). LGUs are required by state law to implement the WCA program.

There currently are 263 individual WCA LGUs consisting of:

- 51 Soil and Water Conservation Districts
- 35 Counties
- 155 Cities
- 19 Watershed Management Organizations
- 3 Townships in the Minneapolis-St. Paul metropolitan area

There are 224 individual LGU staff contacts (due to the sharing of staff and/or the utilization of consultants by some LGUs). Some LGUs employ multiple technical staff that participate in WCA implementation, and Soil and Water Conservation Districts that are not LGUs also have staff that participate on WCA Technical Evaluation Panels (see description below) and play a technical role in enforcement.

LGU responsibilities include working directly with landowners regarding proposed projects that have the potential to impact wetlands, providing trained and knowledgeable staff to implement their WCA responsibilities, and making decisions under the state's authority on applications proposed by landowners for activities that may impact wetlands (i.e. permit applications). These responsibilities are discussed in more detail below.

Minnesota Department of Natural Resources

In addition to its responsibilities for implementing the PWPP, the DNR has other responsibilities relating to the implementation of WCA. The DNR's WCA authority and responsibilities include:

- Serving on the Technical Evaluation Panel for projects affecting public waters or occurring within the shoreland protection zone (1,000 feet of a lake and 300 feet of a river and its designated floodplain).
- The right to appeal LGU decisions to BWSR.
- Making WCA decisions for activities affecting wetlands on DNR-administered state lands.
- Serving as the regulatory authority for calcareous fens, Public Water Wetlands, and wetland impacts resulting from mining.

- Providing for the enforcement of WCA and the PWPP by licensed peace officers.

The DNR's WCA responsibilities are implemented primarily by regional Area Hydrologists (who also implement the PWPP) in the Ecological and Water Resource Division, although multiple other technical and administrative staff may have roles in implementation. For wetland impacts relating to mining projects, WCA standards must be addressed through the permit-to-mine process implemented by the agency's Lands and Minerals Division. DNR's enforcement responsibilities are handled by Water Resource Enforcement Officers and Conservation Officers in the agency's Enforcement Division that are located across the state.

Implementation Structure

The following paragraphs provide a description of how coordination and implementation of the responsibilities listed are carried out, and provide greater detail concerning roles and authorities.

Local Government Unit Decisions

LGUs review proposed activities and applications for wetland delineations, exemptions, replacement plans, etc. and make corresponding verifications or "decisions." Those LGU decisions are made under the state's (BWSR's) WCA authority - not local authority. While some LGUs do have their own local controls, they are separate from and in addition to WCA (local governments can be more restrictive but not less).

Under state law, all LGU decisions must be based on the standards contained in WCA, as established by BWSR. LGUs do not have the authority to modify or deviate from WCA requirements. In addition, LGUs must consider the Technical Evaluation Panel (TEP – see description below) recommendation in their decision and, if the decision differs from the TEP recommendation, explain their reasons for deviating from the TEP recommendation. An LGU decision made contrary to the TEP recommendation, or based on rationale other than WCA standards, provides a clear basis for appeal of that decision to BWSR (see appeals discussion below).

LGUs must provide knowledgeable and trained staff to implement their responsibilities under WCA. BWSR provides annual statewide and regional training courses to LGU staff on both technical and administrative topics. BWSR staff also provide direct, one-on-one training and mentoring to new LGU staff. BWSR provides annual funding to LGUs for WCA implementation (with a required local match), and WCA provides LGUs with the authority to charge application processing fees.

As an example of LGU involvement in WCA, the following are some data from 2018:

- 2,317 WCA applications were submitted.
- Of the submitted applications, 2,255 were approved, 35 were denied, and 27 were withdrawn.
- 183 of the submitted applications were replacement plans, of which 175 were approved for a total of 84.23 acres of approved wetland impacts (an average of 0.48 acres per application). All but 8 of those replacement plans used credits from the state wetland bank for the sole source of mitigation (the remaining utilized project-specific wetland replacement for at least part of the required mitigation).
- 662 potential violations were investigated, resulting in the initiation of 217 formal enforcement actions.

- 3 decisions were appealed to BWSR, all of which were regarding enforcement orders (none were related to WCA decisions). The most recent 3-year average is 4 enforcement-related appeals per year and 1 decision-related appeal per year.

The 2018 numbers are relatively consistent with numbers from 2017 and 2016.

The Technical Evaluation Panel

A WCA Technical Evaluation Panel (TEP) exists for each LGU. The TEP is similar to the federal Interagency Review Team, except the TEP generally plays a greater role in WCA implementation. The TEP consists of a technical professional employee of:

- BWSR,
- the Soil and Water Conservation District,
- the LGU, and
- for projects affecting public waters, public waters wetlands, or wetlands within the shoreland protection zone, the DNR.

The membership of each TEP must include expertise in wetland delineation, classification, and functional assessment. All TEP members receive WCA application information, any member can call a formal meeting of the TEP, and any member has standing to appeal an LGU decision to BWSR.

The TEP reviews proposed projects and develops findings and recommendations which are provided to the LGU. The TEP is also responsible for determining several technical matters (e.g. qualification for preservation credit), and the TEP must consult with the enforcement authority (i.e. DNR) for violations of WCA.

The State Wetland Bank

BWSR is responsible for administration of the state wetland bank, including the following roles and responsibilities:

- Account Management. BWSR is responsible for establishing, operating, and updating the state wetland bank and banking database. This includes an online wetland banking credit tool. In addition, BWSR is currently responsible (via an IPA with the Corps of Engineers) for entering transaction information in the federal banking database (RIBITS) to ensure completeness and consistency.
- Transactions. BWSR reviews and approves all bank transactions, including credit deposits, transfers, and withdrawals. A landowner cannot impact wetlands under an approved wetland replacement plan until confirmation has been received from BWSR that the credits have been withdrawn.
- Bank Easements. WCA requires that a perpetual conservation easement, in a format prescribed by BWSR, be granted to and accepted by BWSR for all wetland bank sites prior to the deposit of any credits in the bank. This responsibility includes establishing the easement itself, coordinating review by the Minnesota Attorney General's Office, and long-term monitoring, stewardship, and enforcement of easement conditions.
- Engineering Standards and Sustainability. BWSR provides for engineering review of all wetland bank applications via licensed on-staff wetland restoration engineers with extensive experience restoring wetlands both for wetland banking and the Reinvest in Minnesota program. BWSR will not accept a bank easement or credit deposit unless the proposed engineering/design plan is

adequate. BWSR's Senior Water Resources Engineer also currently serves as the engineer for the federal Interagency Review Team.

- WCA Standards. BWSR may reject or modify an application for credit deposit if any part of the bank application or plan is inconsistent with WCA standards. Failure to submit the required monitoring reports or otherwise comply with monitoring requirements will also prevent the deposit of credits and may result in the freezing of the bank account by the BWSR until compliance is attained. BWSR will also not accept the easement if the bank plan is inconsistent with WCA standards.
- Compliance. For non-compliant bank sites, BWSR may restrict or "freeze" all credit transactions associated with the bank site until the banking project has been brought into compliance. BWSR can also require corrective actions and, if necessary, undertake reconstruction work to bring the site into compliance and require the reimbursement of associated costs. In addition, noncompliance with easement conditions or impacts to wetlands or associated upland buffer within bank sites are subject to WCA enforcement actions.
- Rules and Procedures. BWSR is the state agency with statutory authority to develop rules that establish the state wetland bank, including all associated standards, procedures, and processes. BWSR also develops all implementation guidance and forms for wetland banking.

BWSR funds the administration of the wetland bank primarily through three statutorily authorized fees:

- Transaction Fees. BWSR charges fees for all bank transactions, including a withdrawal fee of 6.5% of the value of credits for bank withdrawals. These fees can be used for any costs associated with administering the bank.
- Easement Establishment Fee. BWSR charges this fee to each bank site at the time of easement establishment. It is used to cover BWSR's costs to acquire the easement.
- Stewardship Fee. These funds are collected by BWSR for each credit withdrawal and invested by the State Board of Investment on behalf of BWSR. A portion of the corpus is provided annually to BWSR for the purposes of long-term management, stewardship, and enforcement of wetland bank easements.

Appeals

BWSR is the state agency with administrative authority for WCA, and LGUs make decisions on wetlands applications under that authority. Consequently, when an LGU decision is appealed, the appeal goes to BWSR and BWSR makes the decision. Appeals of enforcement orders are also handled by BWSR.

LGU decisions can be appealed by any TEP member, the landowner, and others as specified in law. Not only does BWSR have the authority to appeal any LGU decision, BWSR makes the decision on whether to accept an appeal and BWSR makes the decision on an appeal, even when BWSR is the appellant. BWSR charges an appeal fee (currently \$500), except appeals by TEP members are exempted from the fee. The State Attorney General's Office provides legal representation to BWSR for all appeals.

In addition, under state law an LGU decision is not final until a decision has been made on an appeal or the appeal window is closed. In effect, via its appeal authority, BWSR can reverse any LGU decision prior to it becoming a final decision.

Enforcement

There are several WCA enforcement mechanisms in Minnesota, with the primary authority to initiate enforcement actions and ultimately bring about compliance lying with the state. With few exceptions, the approach to enforcement in Minnesota has proven to be very successful. It is also relied upon heavily to resolve WCA violations that are also Section 404 violations.

- 1) **Minnesota Department of Natural Resources.** The DNR has assigned regional water resource enforcement officers in addition to regular conservation officers (all are licensed peace officers) that have the responsibility and authority to enforce both WCA and the Public Waters Permit Program. Enforcement orders are issued under the authority of the DNR Commissioner. DNR's WCA enforcement authorities include:
 - Cease and Desist Orders. These orders are issued to immediately stop an unauthorized activity or to prevent an action from starting or re-commencing. It is common for the enforcement officer to coordinate with the local government and/or BWSR prior to issuing them. A violation of a Cease and Desist Order is a criminal offense.
 - Restoration and Replacement Orders. A restoration order is issued to the landowner or responsible party to compel restoration of a wetland impacted by an unauthorized activity (or for impacts beyond what was authorized) within a specified timeframe and in accordance with a restoration plan developed by Soil and Water Conservation District technical staff and/or members of the TEP. A replacement order is issued to require mitigation (typically through the purchase of appropriate bank credits) when restoration of the wetland is unlikely to be successful. After-the-fact replacement (mitigation) is usually required at twice the normal ratio. Violations of these orders must be prosecuted by the County Attorney (civil or criminal), or the DNR can initiate a civil suit to compel compliance.
 - Deed Restrictions. WCA violations can also be recorded on the deed of the affected property. A deed restriction is associated with a restoration or replacement order and remains in place until the wetland is restored.
- 2) **Minnesota Board of Water and Soil Resources.** In addition to the LGU's and DNR's enforcement authorities, BWSR has administrative penalty order (APO) authority. BWSR has independent authority to identify violations and issue APOs to compel restoration of the wetland and impose monetary penalties. For non-compliance with an APO, the state's attorney general's office may proceed to enforce penalties that are due and compel compliance through a final judgment of the district court.
- 3) **Local Government Units.** While the most common enforcement mechanism is a DNR-issued order, LGUs can adopt more stringent regulations and enforce them through local controls. It is rare, but LGUs also have the option of developing a restoration or replacement order and having it served by the local Sherriff (any licensed peace officer has the authority to serve such an order). It is important to note that these local enforcement options are in addition to the state's authority and do not replace or supersede it.

BWSR Oversight of LGUs

As the state agency responsible for the administration of WCA, BWSR utilizes several mechanisms to ensure that LGUs are properly implementing their responsibilities under the law.

- Funding and Training. LGUs are required to provide trained and knowledgeable staff to implement their WCA responsibilities. BWSR provides approximately \$2.3 million annually

(which LGUs are required to match) to LGUs to hire and maintain trained and knowledgeable staff for WCA implementation. BWSR also provides statewide and regional training for both wetland delineation and regulation/administration through the Minnesota Wetland Professionals Certification Program. Close records are kept of training attendance to help determine LGU staff qualifications.

- Technical Evaluation Panel. Through BWSR's role on the TEP, we have first-hand knowledge of LGU performance. BWSR Wetland Specialists use the TEP process to influence LGU decisions and as a means to provide informal training, mentoring, and oversight of LGU activities.
- Spot-checks and audits. BWSR conducts both random and targeted spot-checks and audits of LGUs that are implementing WCA. Spot-checks and audits look specifically at LGU performance implementing WCA, but are typically coordinated with BWSR's Performance Review and Assistance Program (PRAP), which can look at broader organizational issues that can be the root cause of poor performance.
- Moratorium. If an LGU is not following WCA in making decisions, if the LGU does not have knowledgeable and trained staff with experience in water resource management, or if the LGU fails to comply with BWSR's reporting requirements, BWSR can declare a moratorium on all activities affecting wetlands within the boundaries of that LGU or take other appropriate legal action to ensure compliance.
- Appeals. As discussed above, BWSR can use appeals to reverse an LGU decision. Appeals can be helpful learning experiences for LGU staff, and multiple appeals can be grounds for performing an audit or declaring a moratorium.

Benefits and Challenges of the WCA Shared-Implementation Model

Local governments have authority over land-use. Utilizing local governments in the implementation of WCA ensures that local staff trained in wetland delineation and regulation are addressing wetlands issues with landowners early in the process, concurrent with site investigations and applications for building permits, plats and subdivisions, septic systems, grading permits, shoreland alterations, conditional use permits, watershed/drainage permits, and other land-use related requirements that are implemented locally. Not only does this ensure awareness of activities that have the potential to impact wetlands, but it provides opportunities to increase the avoidance and minimization of wetland impacts while the landowner is still in early planning stages.

Local involvement in WCA implementation increases awareness of wetlands protection laws. Between LGUs and SWCDs, there are over 300 local staff across the state that are trained and knowledgeable in wetland delineation and regulation. These same staff communicate with landowners on a daily basis, playing an important role in informing the public. In addition, these staff are familiar with projects and activities occurring in their areas and are an excellent resource in the identification and investigation of unauthorized activities.

Trained local staff also provide valuable expertise on local conditions, watershed needs, and other issues important to program implementation and mitigation. LGUs are also typically more responsive and their local presence is more convenient for landowners. Finally, granting local governments with decision-making ability for projects within their jurisdiction provides a sense of ownership in the state wetland laws, which has been extremely important in obtaining and maintaining local support for wetland protection under WCA.

The primary challenge of the shared implementation model is ensuring consistency across the state. BWSR accomplishes this through the multiple methods and mechanisms described above (retaining a substantial degree of authority, involvement in the application review and decision-making process, training, oversight, etc.). Relating to consistency, LGU staff can sometimes experience pressure from locally elected officials to make a decision contrary to WCA; in these instances, BWSR relies on the TEP process and our appeal authority to ensure a proper decision. Ensuring consistency can be challenging, as it is in any regulatory program, but the results indicate that Minnesota's efforts have been very successful.

Terms and Acronyms

- **BWSR:** The State Board of Water and Soil Resources.
- **Deposit:** The deposit of approved credits in the state wetland bank after certain milestones and performance standards. The equivalent of a credit "release" in federal terms.
- **DNR:** The State Department of Natural Resources.
- **Exemption:** An activity that is exempt from mitigation under WCA. Exemptions are the rough equivalent of a non-reporting general permit.
- **LGU:** Local Government Unit, as defined in MN Rule Chapter 8420. LGUs have roles and responsibilities in the implementation of WCA.
- **Project Specific Replacement:** Wetland replacement (mitigation) that is provided by the applicant rather than through the state wetland bank. The equivalent of "permittee-responsible" in federal terms.
- **PWPP:** The Public Waters Permit Program administered by the state Department of Natural Resources. The PWPP regulates activities in lakes, rivers/streams, and some large wetlands.
- **Replacement:** The restoration, creation, or in some cases preservation of wetland resources to replace authorized wetland impacts. AKA mitigation.
- **Replacement Plan:** An application for approval of an activity that impacts wetlands, including sequencing (avoidance, minimization) and mitigation.
- **RIBITS:** The federal Regulatory In-Lieu Fee and Bank Information Tracking System.
- **TEP:** The Technical Evaluation Panel.
- **WCA:** The State Wetland Conservation Act administered by the state Board of Water and Soil Resources with local governments and the DNR involved in implementation. WCA applies to all non-PWPP wetlands in the state, regardless of federal jurisdiction.
- **Withdrawal:** Withdrawing credits from the state wetland bank after the approval of a replacement plan authorizing the associated wetland impacts and credit purchase.